SUPREME COURT, U. S.

AUG 3 1974

MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1446

JOAN ROE, PETER POE, and COE PRESS, INC.,

Petitioners,

—v.—

JANE DOE,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR PETITIONERS

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR PETITIONERS

Opinions Below

The Court of Appeals of the State of New York decided this case without opinion; its original decision is reported at 33 N.Y.2d 902, —— N.E.2d ——, 352 N.Y.S.2d 626, and is set forth in the Appendix at A127; its amended decision, showing the presentation of a federal question, is reported at 34 N.Y.2d 562, —— N.E.2d ——, 354 N.Y.S.2d 941, and is set forth at A128. The opinion of the Supreme Court, Appellate Division, First Department, reported at 42 A.D. 2d 559, 352 N.Y.S.2d 626, is set forth at A103-105, and that of Supreme Court, Special Term, New York County (unreported) at A82-85.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). The decision of the Court of Appeals of the State of New York, of which review is here sought,

was entered on December 28, 1973, and the Petition for a Writ of Certiorari was filed within ninety days, on March 27, 1974; this Court granted the writ on May 28, 1974.

Constitutional Provision Involved

United States Constitution, Amendment One:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

Questions Presented

1(A). Whether the courts below erred in holding that it was not an invalid prior restraint upon freedom of the press, in violation of the First Amendment, to grant a preliminary injunction, completely prohibiting the distribution and sale of a concededly truthful, nonobscene book concerning matters of scientific and medical interest and importance, particularly where the factual grounds alleged in support of the injunction remain disputed and unresolved.

(B) Whether such a prior restraint is constitutionally permissible in the case of a former patient seeking to enjoin publication of an over-10-year-old disguised case history, where the patient claims she is identifiable, notwithstanding the finding by the Court which issued the injunction that the identity of the patient had been disguised in accordance with the usual professional standards in case history publication.

2(A). Whether a state, if it grants to a patient a cause of action for alleged breach by a doctor of the confidential doctor-patient relationship, must limit such a cause of action in compliance with Constitutional standards.

(B). Whether the New York courts, in granting the injunction herein, have established a cause of action which does not, in fact, comply with Constitutional requirements.

Statement of the Case

The petitioners in this case are bringing to this Court for review the extraordinary—indeed, absolutely unprecedented—action of the courts of the State of New York, which for over a year have enjoined the distribution and sale of a concededly truthful and non-obscene book, concerning matters of great scientific and medical importance. The courts below, it is respectfully submitted, have grievously abridged the liberties not only of the petitioners, who are the authors and publisher of the book, but also of countless members of the reading public, lay and professional alike, who are being denied their right to choose for themselves what they wish to read.

The facts in this case, insofar as facts have been found at all by the courts below, are set out most fully in the opinion of the New York Supreme Court, Special Term (A82-85). The petitioners Dr. Roe and Mr. Poe (a wife and husband who are, respectively, a psychiatrist and a lay psychotherapist), wrote the book which is here in issue, and it was published by the third petitioner, Coe Press, Inc. The book, published in February, 1973, consists largely of disguised case histories of the psychiatric treatment of the respondent, Jane Doe, who was from 1956 to 1963 a psychotherapeutic patient of the petitioner Roe, and of the treatment of the respondent's late former husband,[1] who

[1] Mr. Doe was divorced from the respondent in 1963 and remarried shortly thereafter; his new wife, with whom he lived until his death in 1971, resides in New York City, and is well aware of this

during portions of the same period was also a patient of Dr. Roe; the book also contains a brief section concerning one of the children of the respondent. The treatment began more than seventeen years ago, and ended over ten years ago. All of the events related in the book, consequently, are dated by more than a decade.

The respondent learned of the book's publication at about the time it occurred in February, 1973; a month later, she instituted this action in Supreme Court, New York County, alleging that despite the steps taken by the authors to disguise her identity,[2] she could be recognized by the readers of the book, and that the facts of her life thereby revealed were of an intimate and embarrassing nature. She sought both damages, and an injunction against further publication. By order to show cause, she also sought a preliminary injunction, during the pendency of the action, against further publication.

On the return of the order, in Supreme Court, New York County, Special Term, Part I, the *nisi prius* court was presented with affidavits by the parties and others, which reveal chiefly that there are numerous, seriously disputed questions of fact, most importantly, as to whether the respondent's identity can be determined by a reader of the book, and as to whether the respondent gave permission for publication of the book (A8-24, 27-76). Insofar as

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litigation; significantly, despite respondent's assertions that she can be identified in the book largely through the facts of her former husband's life, his widow has taken no steps to assist respondent in this action.

[2] *Inter alia*, fictitious names were used for the patients, the locale of the book was not mentioned, and plaintiff was portrayed as the mother of an only child, although she in fact is the mother of two sibling children.

Special Term resolved these factual disputes at all—and it is the only one of the courts below which has made any significant comment on its view of the facts—it resolved them largely in the petitioner's favor.[2]

Nevertheless, after the briefest of consideration, proceeding solely upon the affidavits and upon oral argument by counsel, without any evidentiary hearing, Special Term issued a partial injunction against further circulation of the book, limiting its distribution solely to "scientific" and "medical" channels, and barring it from "trade book channels of distribution" to the general public (A95). This the court did although it did not offer citation to a single precedent, from this Court or any other, in justification of its literally unprecedented action.

Petitioners forthwith appealed to the Appellate Division, First Department; that intermediate appellate court, on the basis of an even obscurer opinion (A103-105) characterized by vague references to "the expanding recognition of invasion of privacy actions," not only affirmed the issuance of the injunction, but broadened it so as to prohibit *any* distribution of the book whatsoever, whether through

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[2] Special Term found:

> ". . . [D]efendants have taken some steps to disguise the identity of the patients. I think these steps reasonably meet the usual standards for such disguising of patients' identities" (A83) and ". . . the examples of possible identification given by plaintiff in the moving affidavit [A12-17] must be assumed to be the more striking ones. I do not think they would really identify plaintiff as the patient to someone who did not already know that plaintiff was the patient" (A83-84).

The double negative of the last sentence is particularly significant. Special Term finds that plaintiff would *not* be identifiable to any persons who did *not* know that she was a patient of respondent Roe, but does not affirmatively find that she would be identifiable to anyone.

medical-scientific channels or otherwise. Petitioners again appealed by permission of the Appellate Division, to the Court of Appeals of the State of New York. Inexplicably, the Court of Appeals affirmed, without opinion, and without discussion of the merits in any way whatsoever (A127).

Although petitioners have sought at every stage to expedite the proceedings in the State courts, in the hope that the requirements of the First Amendment would be recognized and the injunction would be lifted,[4] distribution of the book has now been enjoined for well over one year, since the entry of the order of Special Term on May 7, 1973. If this Court does not vacate the actions of the courts below, the injunction will remain in effect throughout the pendency of the trial and appeals of this action, which could well consume a period of years. This Court should not countenance such an egregious abridgement of the precious rights which are guaranteed by the First Amendment.

Summary of Argument

I.

A. The opinions of the courts below have conceded that the preliminary injunction is a prior restraint on publication but they have sought to justify it by a flimsily articulated standard which is grossly inconsistent with rulings of this Court. By holding that petitioners must bear the burden of justifying their publication, the lower courts have failed to recognize that a prior restraint is

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[4] The appeal to the Appellate Division was heard on an expedited basis at a special June, 1973, term of that court, rather than being held over through the summer recess. On the appeal to the Court of Appeals, a preference was granted upon motion of the petitioners.

presumptively unconstitutional, and that the burden—an enormous one—must be borne by those who seek injunctive relief.

That a prior restraint is condemned as presumptively unconstitutional is established by an unbroken tradition of decisions of this Court commencing with *Near* v. *Minnesota,* 283 U.S. 697 (1931), and is a doctrine accepted by every member of this Court. Nor may the doctrine of prior restraint be circumvented by enjoining a publication after it is published. As cases and authoritative text make clear, the essence of a prior restraint is that it acts against the published work, and bars it from availability to the public, as distinguished from subsequent punishment which is directed, when appropriate, at the author or the publisher.

The only exceptions allowed or postulated by this Court are confined to obscenity, which is not protected by the First Amendment, and grave threats to national security. Neither such exception is even arguably a factor in this case.

B. Although this Court has never precisely charted the showing which must be made to overcome the enormous presumptive unconstitutionality of prior restraints, it is plain that respondent has egregiously failed to meet that burden, both on the facts and the law.

On the central factual question of whether respondent's identity has been adequately disguised, the only finding in the record is that made by the *nisi prius* court that petitioners have "reasonably" met "the usual standards for such disguising of patients' identity," and nowhere in the record is there a judicial finding that respondent could be

identified by anyone. Moreover, there was no evidentiary hearing at all, much less the kind of prompt and final determination on the merits which this Court has declared constitutionally necessary in those extraordinary situations where it has allowed a publication to be enjoined.

The prior restraint is likewise impermissible because of the highly dubious and speculative nature of any legal basis respondent may have for her claim. The "trade secret" analogy hinted at by the Justice at Special Term, and the vague references to "privacy" in the opinion of the Appellate Division, do not set forth any substantial basis for a cause of action in New York, old or new, and are, in any event, constitutionally insufficient for the extraordinary remedy of enjoining a publication.

II.

Inasmuch as the New York courts nevertheless appear to have created a new cause of action, and have ordered a prior restraint based thereon, this Court, in vacating the injunction, should clarify that any such cause of action must comply with First Amendment requirements.

The medical case history is an established and important institution for the advancement and dissemination of medical knowledge. A cause of action which allows a patient or former patient to obtain damages—and injunctive relief—for the publication of a case history, regardless of the sufficiency of the disguise, unless there is prior written consent, would have a stifling effect on medical and scientific publication, and would abridge First Amendment rights.

Petitioners urge that the only standard which would be consistent with the First Amendment would be one which subjects case history publication to the normal professional

standards of disguised identity, and which restricts liability to a willful or reckless disregard of such standards. Cf. *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967). In any event, the Courts below appear to have embraced a standard of absolute liability, which should be repudiated by this Court as being constitutionally incompatible with both freedom of the press and the advancement of medical knowledge.

ARGUMENT

POINT I

The issuance and affirmance of the injunction by the courts below is in direct contravention of the First Amendment to the United States Constitution as repeatedly interpreted by this Court.

A. *The Injunction Constitutes a Prior Restraint, and Is Therefore Presumptively Unconstitutional.*

That the preliminary injunction granted by Special Term, broadened by the Appellate Division, and affirmed by the Court of Appeals, is a prior restraint on publication is beyond doubt, and conceded by the courts below (A83, 104). That such prior restraint, in the circumstances of this case, is forbidden under the First Amendment to the United States Constitution is equally beyond doubt. Although both parties presented extensive arguments on this point in the courts below, Special Term, in its opinion, without benefit of citation to a single case or other authority, astonishingly overrode all of the clear contrary precedent with the simple observation, "In its usual breadth, I do not accept the applicability of this doctrine to the present case" (A83). The Appellate Division was no more enlightening, observing

only that "we agree with Special Term that the granting of a preliminary injunction, under the circumstances here disclosed, would not constitute an invalid prior restraint upon publication. . . . Not every prior restraint is prohibited" (A104). Only a citation to an irrelevant obscenity case, *Kingsley Books* v. *Brown,* 354 U.S. 436 (1957), discussed *infra,* is offered in support of that holding. The affirmance without opinion of the Court of Appeals, of course, offers no clue whatever to that Court's reasoning. Any more careful analysis of the law of prior restraint, however, cannot but make plain that the issuance of the injunction was erroneous.

The central error in the decisions of the courts below, it is respectfully submitted, is expressed in Special Term's assumption that ". . . the only justification for permitting defendants to publish information obtained in confidence from their patients is the claimed scientific value of the disclosure . . ." (A84). This approach to the question of freedom to publish, of course, is precisely the opposite to the correct approach. " . . . [P]rior restraint of the right of expression . . . calls for a higher hurdle. . . ." *Roaden* v. *Kentucky,* 413 U.S. 496, at 504 (1973). The entire thrust of the First Amendment is that there is a presumption in *favor* of freedom to publish, and it is not for the courts to place the burden of justification on the publisher. See *Healy* v. *James,* 408 U.S. 169, at 184-185 (1972).

The decisions below stand in direct contravention of over four decades of clear and unequivocal decisions by this Court, that prior restraints upon freedom of the press are presumptively unconstitutional, and that the precious and highly preferred rights which are protected by the First Amendment can be overcome only by carry-

ing the heaviest burden of justification. As the Chief Justice has recently observed, ". . . every member of the Court, tacitly, or explicitly, [has] accepted the Near and Keefe condemnation of prior restraint as presumptively unconstitutional." *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, at 396 (1973) (Dissenting Opinion). This solid tradition is founded on the very core of the First Amendment. Professor Emerson, one of the nation's most respected authorities on the First Amendment, has written:

> "As a starting point, one must assume the general principle that under the First Amendment and our notions of a democratic society, freedom of expression is the rule and constraint the exception. It is not necessary to assume that the First Amendment imposes an absolute prohibition against governmental restriction upon public expression nor to accept the constitutional interpretation that gives the First Amendment a 'preferred position' in the scale of constitutional values. . . . But the more commonly accepted principle, that only in the most urgent circumstances can a limitation upon freedom of expression be justified, and that the courts, under the First Amendment, have a serious obligation to strike down limitations which do not clearly meet such conditions, is fundamental to any analysis of prior restraint." T. Emerson, "The Doctrine of Prior Restraint," 20 LAW & CONTEMP. PROB. 648, 655 (1955).

Any analysis of prior restraint must begin—and indeed, can nearly end—with this Court's decision in the Minnesota "gag law" case, *Near* v. *Minnesota,* 283 U.S. 697 (1931), which remains the leading precedent on prior restraint.

In *Near*, the petitioner was the publisher of a "scandal sheet" known as *The Saturday Press*, in which he printed highly scurrilous and defamatory allegations concerning corrupt connections between gangsters and various officials of Minneapolis, and the involvement in such connections of members of Minneapolis' Jewish community. After nine issues had been distributed, the state authorities obtained an injunction forbidding the defendants to publish, circulate, or have in their possession any editions of *The Saturday Press* already published, or any future editions of it or of any similar publication.

This Court made clear, in no uncertain terms, that the injunction which had been granted was an impermissible prior restraint. Mr. Chief Justice Hughes wrote, for the Court:

> "The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in the renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: 'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases

before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.' 4 Bl. Com. 151, 152; see Story on the Constitution, §§1884, 1889." 283 U.S. at 713-714 (emphasis in original; footnote omitted).

"In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment. For whatever wrong the appellant has committed or may commit, by his publications, the state appropriately affords both public and private redress by its libel laws. As has been noted, the statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication." 283 U.S. at 715.

"For these reasons we hold the statute, so far as it authorized the proceedings in this action . . . to be an infringement of the liberty of the press guaranteed by the 14th Amendment . . . [T]he statute imposes an unconstitutional restraint upon publication." 283 U.S. at 722-723.

Nor was any distinction recognized by the Court between the enjoining of future issues of the publication, and the enjoining of further circulation of those issues which had already been published. The entire injunction was found to be improper. See Z. Chafee, Free Speech in the United States, 375-381 (Atheneum Edition, 1969).

It was not any mere oversight which led the Court to hold that enjoining the further circulation of already published issues was a prior restraint. The dissenting opinion of Mr. Justice Butler makes clear that this issue was before the Court:

> "The restraint authorized is only in respect of continuing to do what has been duly adjudged to constitute a nuisance. . . . It is fanciful to suggest similarity between the granting or enforcement of the decree authorized by this statute to prevent *further* publication of malicious, scandalous and defamatory articles, and the *previous restraint* upon the press by licensers as referred to by Blackstone and described in the history of the times to which he alludes." 283 U.S. at 735-736 (emphasis in original).

Thus it is plain that the *Near* court intended to hold, and did hold, that the enjoining of further circulation, after a newspaper, or a periodical, or a book has once been published, is no less a prior restraint than is an order forbidding publication at all.

Respondent argued in the courts below, and will no doubt argue in this Court, that once so much as a single copy of a book has reached the public, an injunction against further circulation does not constitute a prior restraint or any violation of the First Amendment. The error in this argument is that it focuses on only a single form of prior restraint, when it is plain that there are many forms. It is similarly plain that all are condemned equally by the First Amendment. Professor Emerson, in "The Doctrine of Prior Restraint," *supra,* at 655-656, identifies four broad categories of such restraints: first, licensing schemes prohibiting *any* publication without prior approval of an administrative official or censor; second, the invocation of the judicial process to obtain injunctive relief, as in *Near,* and as plaintiff is attempting in this case; third, legislative restraints permitting publication only upon the satisfaction

of certain prior conditions, such as the payment of taxes or the registration of lobbyists; and fourth, most indirectly, those "secondary" restraints resulting from such legislative schemes as the requirement to hold certain political views as the test of holding an office.

An argument asserting that an injunction such as the one obtained here does not constitute a prior restraint, fails to recognize these several categories of prior restraints, but deals solely with the first and most elementary of them. The error is in failure to perceive that a prior restraint is characterized not by the *time* it is invoked—not by whether or not it occurs "prior" to the first circulation of the material in question—but by the method of the restraint, and at whom or what it is directed. Thus, the common thread in all of the forms of prior restraint delineated by Prof. Emerson, *supra,* is that each in one way or another involves an order by some organ of the government that the circulation of the subject material be forbidden. The essence of a prior restraint is that the law acts against the publication, not the publisher.[5]

This principle was most recently reaffirmed by this Court in *Heller* v. *New York,* 413 U.S. 483 (1973), an obscenity case in which the Chief Justice's opinion for the Court made abundantly clear that, while a single copy of an allegedly obscene film, book, or other article might properly be seized in order to preserve evidence to determine its

[5] For an excellent historical analysis of the evolution of the law of prior restraint, see *Alderman* v. *Philadelphia Housing Authority,* —— F.2d ——, ——, 42 U.S.L.W. 2574 (3rd Cir. Civ. No. 73-766, April 16, 1974). Judge Adams, in the course of his analysis, quotes Milton's Areopagitica: "Who kills a man kills a reasonable creature, God's image; but he who destroys a good book kills reason itself . . ." *Alderman, supra,* —— F.2d at ——, —— U.S. L.W. at ——.

obscenity, the state must be absolutely scrupulous in permitting continued exhibition or circulation pending a final judicial determination. The risk of imposing a prior restraint on protected material is otherwise too great. 413 U.S. at 492. Any fanciful notion that the law of prior restraint becomes inoperative after initial publication is totally demolished by *Heller*.

Following *Near*, this Court, notwithstanding its changing composition, has been absolutely consistent, to the present day, in holding that "any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Heller* v. *New York*, *supra*, at 491; *Healy* v. *James*, 408 U.S. 169, at 184 (1972); *New York Times Co.* v. *United States*, 403 U.S. 713, at 714 (1971); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971); *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, at 181 (1968); *Freedman* v. *Maryland*, 380 U.S. 51, at 57 (1965); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, at 70 (1963). In every one of the latter cases, although the systems for the prior restraint of free expression sought to be imposed varied radically, each was held to be invalid. Thus, this Court has refused to permit the use of judicial injunctions against the publishing of news, in the face of a government claim of an extreme threat to national security (*Times*); or against residential picketing and leafletting, in the face of a privacy claim (*Keefe*); or against rallies preaching race hatred, in the face of a claim of imminent danger of riot (*Carroll*); it has ruled that a college may not deny recognition to a student organization without first meeting the burden of demonstrating the appropriateness of denial of recognition (*Healy*); it likewise struck down a system of movie censorship (*Freedman*), and a system of state-supported, "in-

formal" discouragement of the circulation of books (*Bantam Books*). See also *Alderman* v. *Philadelphia Housing Authority*, —— F.2d ——, 42 U.S.L.W. 2574 (3d Cir. Civ. No. 73-766, Apr. 16, 1974) (absolute ban on comment by housing authority employees on pending tenant plebiscite); *Albany Welfare Rights Organization* v. *Wyman*, 493 F.2d 1319 (2d Cir. 1974) (prohibition of distribution of welfare rights information in public waiting room of welfare center).

The sole case known to petitioner in which this Court has ever approved a form of prior restraint of circulation of the printed word is *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 (1957), which is so clearly distinguishable from the present case as to be almost totally irrelevant.[6] The plainest distinction, of course, is that *Kingsley* involved material which was unquestionably obscene, and therefore beyond the protection of the First Amendment. No question of obscenity has been raised in the present case.[7] As Mr. Justice Brennan observed, concurring in *New York Times* v. *United States, supra*, 403 U.S. at 726, fn. 1:

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[6] As the *Kingsley* Court observed, "The phrase prior restraint is not a self-wielding sword. Nor can it serve as a talismanic test." *Id.* at 441. This Court has indeed before and since occasionally approved prior restraints under certain very limited, carefully defined circumstances. While the Court has never fully defined all of the elements constituting the "heavy burden" which a would-be censor, private or public, must satisfy, plaintiff has satisfied *none* of the tests which have been advanced in the cases; see Point IB, *infra*.

[7] At oral argument in the New York Court of Appeals, respondent's counsel in effect conceded that the book could not be attacked as obscene, but asserted that it was nevertheless entitled to no First Amendment protection, because the therapeutic view it expressed, the treatment of schizophrenia without shock or drugs, was not scientific, but "quackery."

"... [C]ases regarding temporary restraints of allegedly obscene materials, are not in point, for those cases rest upon the proposition that 'obscenity is not protected by the freedoms of speech and press.' *Roth* v. *United States*, 354 U.S. 476 (1957)."

See also *Near* itself, which made clear that it was not intended to bring obscenity within the protection against prior restraints. 238 U.S. at 716.[8]

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[8] *Near* also suggested that a prior restraint might be valid in such "exceptional cases" as "the publication of the sailing dates of transports or the number and location of troops," 283 U.S. at 716, citing Mr. Justice Holmes' well-known dictum in *Schenck* v. *United States*, 249 U.S. 47, at 52 (1919) concerning the scope of emergency powers "When a nation is at war . . . ." But even a governmental claim of threat to national security was deemed insufficient to overcome the presumption in *New York Times Co.* v. *United States*, *supra*. Compare *United States* v. *Marchetti*, 466 F.2d 1309 (4th Cir. 1972), cert. den. 409 U.S. 1063 (1972).

It has been intimated by respondent in the Brief in Opposition to Certiorari, p. 12, that *Near* also authorized, at 283 U.S. 716, an exception "to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity." Petitioners respectfully submit that this is a distorted and extracontextual reading of *Near*. Chief Justice Hughes in fact wrote, after noting possible exceptions for war-time emergency powers and obscenity cases: "These limitations are not applicable here. *Nor are we now concerned with questions as to the extent of authority* to prevent a publication in order to protect private rights according to principles governing the exercise of the jurisdiction of courts of equity." 283 U.S. at 716. (Emphasis added to indicate words omitted by respondent.) That this additional sentence was not intended to create another exception was made even clearer by Mr. Justice Harlan in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, at 149 (1967). At the conclusion of the sentence quoted from *Near*, Chief Justice Hughes appended footnote 7, which reads "See 29 Harvard L. Rev. 640." The article cited is Prof. Roscoe Pound's well-known but never-accepted argument urging "Equitable Relief against Defamation and Injuries to Personality." And Mr. Justice Harlan pointed out in *Curtis* that "... we have rejected all manner of prior restraint on publication, Near v. Minnesota [citation], despite strong arguments that if the material was unprotected the time of suppression

Notwithstanding the clear and unequivocal nature of this unbroken chain of decisions by this Court, all were simply ignored by the courts of the State of New York.[9] Special Term's opinion, without benefit of citation to a single case or other authority, simply ignored all of the clear contrary precedent with its astonishing observation, "In its usual breadth, I do not accept the applicability of this doctrine [of prior restraint] to the present case" (A83); the Appellate Division was no more enlightening, observing only that ". . . we agree with Special Term that the granting of a preliminary injunction, under the circumstances here disclosed, would not constitute an invalid prior restraint upon publication." (A104); the Court of Appeals, without opinion, affirmed these incredible holdings.

It is plain, however, as has been demonstrated, that under this Court's decisions, the injunction which is now outstanding "... is nothing if not a form of prior restraint ...," *Doe* v. *McMillan*, 403 U.S. 306, at 345 (1973) (Opinion of Rehnquist, J., concurring in part and dissenting in part), in its clearest form. It is equally plain, as will now be

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was immaterial," specifically citing the Pound article, *Curtis, supra*, 388 U.S. at 149. Thus the most that can be said is that Chief Justice Hughes in 1931 was aware of Prof. Pound's advocacy of prior restraint, and never accepted it, and Mr. Justice Harlan writing 36 years later, authoritatively stated that the argument had been rejected.

[9] Appellate courts in other states have not demonstrated comparable difficulties in recognizing and striking down prior restraints. See, e.g., *American Broadcasting Companies, Inc., et al.* v. *Smith Cabinet Manufacturing Company, Inc.*, —— Ind. App. ——, ——N.E.2d ——, 43 U.S.L.W. 2009 (Ind. Ct. of Apls., 1st Dist., No. 1-1273A219, June 12, 1974) (dissolving preliminary injunction against television broadcast of documentary film segment which lower court judge found to be false depiction of flammability of baby crib).

shown, that respondent has failed utterly to satisfy the heavy burden which must be met before any such injunction may issue.

B. *Plaintiff Has Failed to Make the Showing Required to Overcome the Constitutional Presumption Against Prior Restraints.*

Despite the clear and weighty presumption, to which this Court has adhered for nearly half a century, against the allowance of prior restraints, respondent has succeeded in having the courts below enjoin for over a year the book which is here in issue, and has done so on such a flimsy factual and legal basis as to be utterly outrageous. Even if it could be argued that after a full trial of the merits of this case, and a final judgment in respondent's favor, an injunction against further publication would be justifiable,[10] no such trial has been held here, and the issuance and continued existence of the preliminary injunction is an all the more egregious violation of the First Amendment. It is of course not the province of this Court to engage in fact finding as to whether respondent may be identified in the book, or whether she gave permission for publication; and it is a question of state law as to whether written consent to case history publication is necessary, or whether respondent should have a cause of action at all.[11] This Court has nevertheless acknowledged a duty to engage in sufficient "constitutional fact finding," cf. *Beckley Newspaper Corp.* v. *Hanks*, 389 U.S. 81, at 82

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[10] Petitioners do not concede that an injunction would be proper even after final judgment against them; precisely such an injunction was at issue, and found improper, in *Near*.

[11] But any such cause of action must, of course, meet constitutional requirements; see Point II, *infra*.

(1967); *New York Times* v. *Sullivan*, 376 U.S. 254, at 284-285 (1964), to ascertain whether the constitutional standards which must control in this case have been properly applied by the courts below.

What is revealed by the record, however, is that there are hotly contested factual questions concerning the most central issues in this case, of identification of the plaintiff, and of her permission to publish; insofar as these factual issues have been resolved at all, they have been largely resolved in favor of the petitioners. See n. 2, *supra;* it is doubtful that plaintiff can be recognized at all by readers of the book, and if she cannot be identified, the book's publication simply does not harm her, and she has *no* legally cognizable interest for the state to protect.

Likewise, there are seriously disputed and unresolved issues of state law in the case, primarily whether the New York courts will, after more than 70 years, overrule the venerable[12] precedent of *Roberson* v. *Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902), and recognize for the first time some sort of "right of privacy" beyond the statutory right contained in §§50-51 of the New York Civil Rights Law. The highest court to have spoken on this issue in this case could offer no more than a passing reference to "the expanding recognition of invasion of privacy actions" (A104).[13] It did not even begin to define,

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[12] But still vital; see *Nader* v. *General Motors Corp.*, 25 N.Y.2d 560, at 573, 255 N.E.2d 765, at 776, 307 N.Y.S.2d 647, at 658 (1970) (concurring opinion of Judge, now Chief Judge Breitel).

[13] Both of the opinions in the courts below implicitly recognize that there is no common law cause of action in New York for breach of doctor-patient confidentiality, Special Term by reaching for a strained trade secret analogy (see p. 26, *infra*) and the Appellate Division by limiting itself to the above vague observation. No decisions applying New York law were even mentioned.

much less analyze, the nature or extent of the interests supposedly sought to be protected by the state, and to outweigh the clear and essential interests protected by the First Amendment.[14]

The issuance of a preliminary injunction, based on such flimsy factual grounds, and undefined legal grounds, is an example of the very evil against which this Court warned in *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations, supra.* While the scheme of regulation of illegal discriminatory advertising there involved was found to be constitutional, the Court carefully noted that a full trial of the issues would be necessary before any sanctions could be imposed:

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[14] Any such analysis would have to confront the holdings of this Court that even in the case of a clash between a privacy claim and a First Amendment claim, the primal magnitude of the First Amendment must prevail; see *Organization for a Better Austin, supra,* 402 U.S. 415, at 419-420; *Time Inc.* v. *Hill,* 385 U.S. 374, at 388 (1967); particularly is this so where the First Amendment infringement is a prior restraint, see *Organization for a Better Austin.* See also *Public Utilities Commission* v. *Pollak,* 343 U.S. 451 (1952); *Albany Welfare Rights Organization* v. *Wyman,* 493 F.2d 1319, at 1324 (2d Cir. 1974) ("We do not consider the right of privacy of the welfare recipients as a compelling consideration against First Amendment rights.") As Judge Frankel has held: ". . . plaintiff proposes to stretch the constitutional dimensions of 'privacy' far beyond any reasonably foreseeable limits the courts ought to enforce." *Lamont* v. *Commissioner of Motor Vehicles,* 269 F. Supp. 880, 884 (S.D.N.Y. 1967), aff'd 386 F.2d 449 (2d Cir. 1967), cert. den. 391 U.S. 915 (1968). Prof. Franklyn S. Haiman, who has closely studied this problem, concludes:

> ". . . in the clash of free speech and privacy interests . . . we must be careful not to allow our natural sympathy for tender psyches to beguile us into accepting serious erosion of the First Amendment. The human psyche . . . is tougher than most of its would be protectors are inclined to admit. It is generally quite capable of taking care of itself." Haiman, "Speech Against Privacy: Is There a Right Not To Be Spoken To?" 67 N.W.U.L. REV. 153, 199 (1972).

> "The special vice of a prior restraint is that communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment . . . . [B]ecause no interim relief was granted, the order will not have gone into effect until it was *finally determined* that the actions of Pittsburgh Press were unprotected." 413 U.S. at 390 (emphasis supplied; footnote omitted).[15]

So far from basing their actions on any such final determination as was approved in *Pittsburgh Press*, or in *Kingsley*, the courts below have acted upon no more than speculation and guesswork, that after a full trial of the action, plaintiff *might* prove to be identifiable despite the seemingly contrary finding of Special Term, and the New York courts *might* find a cause of action to exist. These speculative possibilities, the courts below have impliedly held, are sufficient to justify the granting of an injunction which necessarily, immediately and irreparably causes the greatest of harm to the First Amendment rights both of the petitioners and vast numbers of the public at large.

While it is true that this Court has occasionally sanctioned restraints upon the press, prior to final judicial determination that the material involved is unprotected, the injunction which has been issued here plainly does not meet the standards which this Court has established for the

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[15] Even with this assurance in Mr. Justice Powell's opinion for the Court, the Chief Justice nevertheless dissented on the ground that "The weighty presumption of unconstitutionality of prior restraint" was not sufficiently respected. *Id.* at 396 n.3; and see the Chief Justice's opinion for the Court in *Heller* v. *New York*, 413 U.S. 483, at 493 (1973).

imposition of such restraints. First, such restraints have been approved only in areas which have traditionally been subject to somewhat "special" treatment, as in *United States* v. *37 Photographs*, 402 U.S. 363 (1971) (border searches), and in *Freedman* v. *Maryland*, 380 U.S. 51 (1965) and *Times Film Corp.* v. *Chicago*, 365 U.S. 43 (1961) (moving pictures).

In addition, such restraints as this Court has approved, even in these limited areas, have been subject to the very strictest of time limits, see, e.g. *United States* v. *37 Photographs, supra*, establishing limits of 14 days for the commencement, and 60 days for the completion, of forfeiture proceedings involving allegedly obscene materials seized by the Customs Service. The injunction here, already outstanding for over a year, hardly meets such standards.[16] Indeed, it is doubtful whether, in an action such as the present one, a court could ever act at once quickly enough, and with sufficient certainty, to satisfy the constitution. In an obscenity case for instance, such as *37 Photographs*, the fact finding task of the court is limited; a given film or book or other article must merely be reviewed, and the law applied to it. In the present case, by contrast, a vast amount of factual matter must be reviewed, comparing events in the book with events in the actual life of the plaintiff, to determine whether the plaintiff in fact is, or might, be identifiable to a reader of the book. Such information was not before the court at Special Term when it acted.

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[16] Cf. *Grove Press, Inc.* v. *City of Philadelphia*, 418 F.2d 82, 90 (3rd Cir. 1969): "The preliminary restraint could exist days and even months, before the judicial decision on the merits; where this possibility exists, an unacceptable threat to the freedom of expression without due process of law results."

nor before any of the other courts below. It is difficult to conceive how it could have been.[17]

The courts below, it is respectfully submitted, may have acted as they have because they have permitted themselves to be rushed into judgment by plaintiff's lurid descriptions of the intimate matters which are discussed in some parts of the book.[18] But all of the courts below have simply ignored the fact that plaintiff cannot be harmed if she cannot be identified by readers, and if the book only reveals that some anonymous person related these experiences to her psychotherapist.[19]

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[17] Five days have been consumed in the deposition of the plaintiff, and one more day of examination is scheduled at this writing; objections by plaintiff's counsel have raised the necessity that rulings will have to be obtained from the court on numerous questions relating directly to the plaintiff's identification. The deposition of at least one, and possibly more, of the defendants must yet be taken, as well as possible depositions of witnesses. Even assuming attorneys—and litigants—with schedules permitting them to devote their entire time to a single case, it is nearly impossible to conceive of a final judgment occurring in less than many weeks, or even months.

[18] Plaintiff's counsel have especially delighted in quoting, to every court which has heard this case, the few lines set forth at page 4 of the Brief in Opposition to Certiorari; they are hardly typical of the 1008 pages (and 1716 footnotes) which constitute the book. Notwithstanding all of this Comstockian effort, any fair reading of the book will make it apparent that it is in fact a serious scientific case history of the treatment of schizophrenia.

[19] For similar reasons, such statutory provisions as New York Civil Practice Law and Rules §4504(a)—which relates to testimonial privilege—and New York Education Law §§6509-6511 and pursuant regulations—which relate to doctor-patient confidentiality—are irrelevant, for they plainly contemplate situations in which the patient's identity is revealed, as do such cases as *Feeney* v. *Young*, 191 App. Div. 501, 181 N.Y. Supp. 481 (Sup. Ct. 1st Dept. 1920); *Felis* v. *Greenberg*, 51 Misc.2d 881, 273 N.Y.S.2d 288 (Sup. Ct. Kings Co. 1966); and *Clark* v. *Geraci*, 29 Misc.2d 791, 208 N.Y.S.2d 564 (Sup. Ct. Kings Co. 1960).

The courts below may have also been misled by plaintiff's faulty analogy to "trade secrets" cases, as expressly relied upon, although without a single citation of case or text, by the opinion of Special Term (A83). The analogy is erroneous, however, for at least two reasons. First, in a trade secret case, disclosure of the information involved, be it a secret formula, a customer list, or whatever, would ordinarily be harmful without regard to whether the owner of the information is identified. See *Kewanee Oil Co.* v. *Bicron Corp.*, —— U.S. ——, at ——, 42 U.S.L.W. 4631, at 4633 (May 13, 1974). In the present case, by contrast, plaintiff can only be harmed if readers of the book can recognize her. Second, it is difficult to detect any First Amendment interest, which is served by disclosure of the types of information customarily involved in trade secret cases. Here, by contrast, whatever information is revealed is intimately bound up with the author's comments upon it, and upon the course of treatment, and thus with the contribution which the book seeks to make to the advancement of medical science. Indeed, if there was, as Special Term found, an "implied, if not express, agreement that confidence would be respected" (A83), such an agreement can only be implied from the usual practices which prevail in the profession of psychiatry. But any such agreement must also, then, incorporate all of the usual professional practices, including the possibility that the patient's case will contain elements which make it a desirable subject for the writing of a case history, provided, of course, that reasonable steps are taken to mask the patient's identity.[20]

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[20] Plaintiff, who has made much of the fact that she herself is a psychiatric professional (see, e.g., affidavit in support of motion, at A8-9), must be presumed even more than the ordinary patient to have been aware of the professional practice of writing case histories.

It is thus readily apparent that plaintiff offered to the courts below hardly a scintilla of support, in fact or in law,[21] for the drastic relief of prior restraint of the press which she sought from them. But those courts, so far from requiring her to meet the heavy burden which this Court has repeatedly demanded to justify such a restraint, have blatantly ignored the dictates of the First Amendment and a half century of this Court's decisions. The courts below have committed "fundamental errors—discounting the existence of a cognizable First Amendment interest and misplacing the burden of proof. . . ." *Healy* v. *James, supra,* 408 U.S. at 184-185.

The record in this case unquestionably compels a holding by this Court that the relief which plaintiff has been granted is an utterly impermissible prior restraint on the publication of a constitutionally protected work. The injunction which has now been in existence for over a year is an outrageous abridgement of the rights of both the peti-

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[21] Respondent argued below, and may urge here, that the book in question is entitled to less than the full measure of First Amendment protection because it is "commercial." Although no authority is cited, there are statements in the decision of Special Term (A84) and the Appellate Division (A104) which suggest that the argument may have been cordially received. Any such contention would be completely without merit in the light of this Court's decision in *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations, supra.* However, the special circumscribed area of "commercial speech" is ultimately defined by this Court, it is clear that there is a substantive difference between a want-ad, *Pittsburgh Press, supra,* or a commercial handbill, *Valentine* v. *Chrestensen,* 316 U.S. 52 (1942), and a book, or an advertisement for a book. ". . . [S]peech is not rendered commercial by the mere fact that it relates to an advertisement." *Pittsburgh Press, supra,* 413 U.S. at 384. "[C]ommercial activity in itself is no justification for narrowing the protection of the First Amendment." *Ginzburg* v. *United States,* 383 U.S. 463, at 474 (1966). "[I]t is of course no matter that the dissemination takes place under commercial auspices." *Smith* v. *California,* 361 U.S. 147, at 150 (1950).

tioners and the reading public, contrary to the most fundamental protections of the Constitution, and petitioners respectfully submit that the decision below must be reversed.

POINT II

Any cause of action established by the New York courts must comply with constitutional requirements.

It is of course the business of the New York courts, and the New York legislature, to determine whether that state is to accord a cause of action to patients who assert that their doctors have breached the confidentiality inhering in the doctor-patient relationship. But whether such action is labelled "invasion of privacy," or "breach of confidence" or something else, it is subject to First Amendment strictures:

> ". . . [W]e are compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law. [Citation omitted] Like insurrections, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional scrutiny. It must be measured by standards that satisfy the First Amendment." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, at 269 (1964) (footnotes omitted).

Just as in libel, actions within the "privacy" constellation can have no "talismanic immunity":

> "Designating the conduct as an invasion of privacy, the apparent basis for the injunction here, is not sufficient

to support an injunction against peaceful distribution of informational literature of the nature revealed by this record." *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, at 419-420 (1971).

See also, e.g., *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967).

It is apparent that the New York courts have found in this case, which is substantially one of first impression,[22] that a patient does have a cause of action for alleged breach of confidence by a doctor. It is equally apparent that they have paid little or no attention to the limitations which the Constitution imposes on any such action, and where it is this failure to give effect to the Constitution's commands which underlies the injunction in issue, the constitutional limitations on the cause of action are properly before this Court.

That a cause of action which exposes doctors to liability for the publication of case histories has First Amendment implications, would appear to be indisputable. The use of the case history is a major tool in the advancement and dissemination of medical learning. It is used regularly by psychiatrists and other doctors to enhance the knowledge of both their professional colleagues and the interested lay public. As the court of original jurisdiction noted, the first psychiatrist to publish case histories was Dr. Sigmund

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[22] Cases which have touched on similar areas have involved undisputed identification of the patient, e.g., by use of the patient's picture, *Feeney* v. *Young*, 191 App. Div. 501, 181 N.Y. Supp. 481 (Sup. Ct. 1st Dept. 1920); or by actual name, *Felis* v. *Greenberg*, 51 Misc. 2d 881, 273 N.Y.S.2d 288 (Sup. Ct. Kings Co. 1966); *Clark* v. *Geraci*, 29 Misc. 2d 791, 208 N.Y.S.2d 564 (Sup. Ct. Kings Co. 1960). Petitioners' research has revealed no case in American law in which the subject of a medical case history has brought an action alleging insufficient disguise.

Freud himself (A83). Their use has continued to be of major importance.[23]

If a doctor has met the usual professional standards for disguising the patient's identity—the standards which have been evolved over the years by the profession itself—and the patient, nevertheless, as the courts below have held, can base an action on the publication of a case history, the result will plainly be the abrupt overturning of a long-established, vital and accepted practice of medical writers, researchers and educators. A sharp reduction in case history publication—the inevitable result of the decisions below, should they be allowed to stand—will hurt not only

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[23] "The case history is an important teaching tradition in medicine." Schultz & Kilgallen, CASE HISTORIES IN SCHIZOPHRENIA (1969). "Most scientific-medical articles, case studies, case reports and clinico-pathological reports are based on actual medical experiences with patients. Medicine does not find it necessary to identify these patients." American Medical Association, OPINIONS AND REPORTS OF THE JUDICIAL COUNCIL 59 (1971). An examination of one full year's issues of leading psychiatric journals reveals that, respectively, 33% and 23% of the articles contain detailed and explicit case histories illustrating the medical matters discussed. 36 PSYCHIATRY: JOURNAL FOR THE STUDY OF INTERPERSONAL PROCESSES (1973); 28 ARCHIVES OF GENERAL PSYCHIATRY (1973). Nor is case history publication limited to psychiatry. A sampling of scholarly journals in other fields of medical specialization reveals the following comparable information: 78 ANNALS OF INTERNAL MEDICINE (1973)—45%; 82/83 JOURNAL OF PEDIATRICS (1973)—47%; 227/228 NEW ENGLAND JOURNAL OF MEDICINE (1973)—28%; 28 OBSTETRICAL AND GYNECOLOGICAL SURVEY (1973)—15%; 1973 LANCET—17%; 48 MAYO CLINIC PROCEEDINGS (1973)—28%.

Case history publication appears even more frequently in the journals of the established institutions of the American medical profession. See 225/226 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION (1973)—51%; 56 MINNESOTA MEDICINE (1973)—44%; 30 ARIZONA MEDICINE (1973)—39%; 37 CONNECTICUT MEDICINE (1973)—31%; 69 OHIO STATE MEDICAL JOURNAL (1973)—53%; 70 ROCKY MOUNTAIN MEDICAL JOURNAL (1973)—51%; 73 NEW YORK STATE JOURNAL OF MEDICINE (1973)—46%.

doctors and the teaching of medicine. The ultimate loser will be the public health of the nation.[24] "As a result, organized scientific . . . research could become fragmented, and society, as a whole, would suffer." *Kewanee Oil Co.* v. *Bicron Corp.*, —— U.S. ——, at ——, 42 U.S.L.W. 4631, at 4636 (May 13, 1974).

As this Court has held, in the words of Mr. Justice Brennan, where matters of great importance to society are involved,

> "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government . . . . Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable members of society to cope with the exigencies of their period'. *Thornhill* v. *Alabama*, 310 U.S. 88, 102 [1939]" *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967).

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[24] Section 10 of the Principles of Medical Ethics of the American Medical Association reads: "The honored ideals of the medical profession imply that *the responsibilities of the physician extend not only to the individual, but also to society*, where these responsibilities deserve his interest and participation in activities which have the purpose of improving both the health and well-being of the individual and the community." American Medical Association, OPINIONS AND REPORTS OF THE JUDICIAL COUNCIL vii (1971). (Emphasis added.)

In *Time*, the question at issue was the standard of care to be required of a publisher, in insuring the accuracy of an article concerning a matter of public interest, where the subjects of the article alleged that it contained misstatements about them, and had brought an action under the New York "privacy" statute.[28] Merely establishing the falsity of the article, this Court held, could not suffice for recovery, for "the impossible burden of verifying to a certainty" the truthfulness of every fact in such an article rendered inevitable the occasional appearance of error, even assuming the best of faith by the publisher. Therefore, erroneous statement, if "innocent or merely negligent," must be protected equally with the truth, "... if the freedoms of expression are to have the 'breathing space' that they 'need ... to survive' ...." 385 U.S. at 388-389, citing *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). A standard of recovery based on absolute liability, or even on negligence, would "create a grave risk of serious impairment" of First Amendment freedoms, for even a negligence test

> "... would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference ....
>
> "In this context, sanctions against either innocent or negligent misstatement would present a grave hazard

[28] New York Civil Rights Law §§50-51, forbidding the use without consent of a person's "... name, portrait or picture ... for the purposes of trade ...." The New York Courts had already held that, as to matters of public interest, truthful reporting must be protected by the First Amendment and was not actionable. But erroneous or "fictionalized" reporting could give rise to liability. *Spahn* v. *Julian Messner, Inc.*, 18 N.Y.2d 324, 221 N.E.2d 543, 274 N.Y.S.2d 877 (1966), vac. on other grounds, 387 U.S. 239 (1967).

of discouraging the press from exercising the Constitutional guarantees .... Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to 'steer . . . wider of the unlawful zone,' *New York Times Co.* v. *Sullivan*, 376 U.S., at 279 . . . ; see also *Speiser* v. *Randall*, 357 U.S. 513, 526 . . . ; *Smith* v. *California*, 361 U.S. 147, 153-154 . . . ; and thus 'create the danger that the legitimate utterance will be penalized.' *Speiser* v. *Randall, supra*, 357 U.S. at 526 . . ." 385 U.S. at 389.

It is not, of course, any issue of the truth or falsity of the book, which this case presents. It is rather the reasonableness of the steps taken by the book's authors and publisher to disguise the respondent's identity, and it is the possibility of an insufficient disguise which has brought this case to the courts. The applicability to this issue of Mr. Justice Brennan's reasoning in *Time*,[28] however, would appear to be well-nigh indisputable. The publication of case histories by physicians is plainly of the greatest social importance, involving First Amendment interests of at least the magnitude of the material in *Time*, and surely deserving of no less protection. But if the author of such material can be found liable for a breach of patient confidence, upon any showing by the patient that the disguise was in-

[28] The ruling of this Court in *Time, Inc.* v. *Hill, supra*, and the reasoning of Mr. Justice Brennan's opinion for the Court, appear to be unaffected by this Court's recent decision in *Gertz* v. *Robert Welch, Inc.*, —— U.S. ——, 42 U.S.L.W. 5123 (June 25, 1974). Writing for the Court in *Gertz*, Mr. Justice Powell observed that the holding in *Time* "was not an extension of *New York Times* but rather a parallel line of reasoning applying that same standard to this discrete context . . ." *Gertz, supra*, 42 U.S.L.W. at 5127, n. 5.

sufficient, and that *any* relative or friend or acquaintance of the patient could penetrate the mask, the severity of the blow to medical writing is readily apparent.[27]

Concededly, it is hardly improper to require such a writer to take some reasonable steps to disguise the subject patient. But to impose a burden of disguise so absolute that the writer must guess at, and eliminate, *every* element of the patient's life which *might* be known to others, is to impose a burden so onerous that medical writing would become all but impossible.[28]

The only standard of disguise which can possibly protect such writing with sufficient "breathing space" to satisfy the First Amendment, it is submitted, is the same standard as found applicable in *Time:* to publish an article with actual knowledge that it will identify its subject,[29] or in

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[27] The chilling effect on medical research and writing would not be limited to the psychiatric specialist. See Note 23, *supra*. But, as a distinguished scholar has observed, "The psychiatrist more than anyone else, runs the risk of being charged with professional indiscretions and is especially vulnerable to suit." Slovenko, PSYCHOTHERAPY, CONFIDENTIALITY AND PRIVILEGED COMMUNICATION 64 (1966).

[28] It may be assumed that no case history, however carefully disguised, can be absolutely and hermetically sealed from recognition against everyone. A patient's spouse, or parent, or sibling, or roommate, particularly one who knows that the patient was treated by the doctor, might be able to make the identification. Total certainty of disguise cannot be absolutely guaranteed, anymore than a total vacuum can be created within the atmosphere of the Earth. The law cannot insist that Achilles overtake the hare when it is physically impossible to do so. The question is rather one of establishing a constitutionally appropriate standard of conduct, bearing in mind the conflicting interests at stake in "the productive tension between the needs and advancement of science and the vibrant diversity of human personality." See, Ruebhausen and Brim, "Privacy and Behavioral Research," 65 COL. L. REV. 1185, 1211 (1965).

[29] By use of the patient's true name or picture, for instance.

reckless disregard of whether it will do so,[30] may properly, under the Constitution, be made the measure of liability; as with "calculated falsehood" in *Time*, it is difficult to comprehend a First Amendment interest in knowing or reckless disclosure, and petitioners do not argue that such disclosure should be protected. To permit recovery upon mere negligence, however, or even innocent failure to disguise sufficiently, is totally improper, and should not be countenanced by this Court.[31]

The courts below, however, have plainly failed to adhere to any such standard; indeed, their finding of a cause of action, and issuance of an injunction, on the record before them, appear to posit a standard of absolute liability, indeed, liability without fault.[32] The sole evidence before

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[30] By inclusion, perhaps, of some utterly unambiguous identifying characteristic, unique to the patient, which the writer well knows is a matter of which many of the patient's acquaintances are or might be aware.

[31] Indeed, this Court has in the past recognized, in a somewhat parallel circumstance where a plaintiff sought to assert a right of personalty that trenched on First Amendment interests, that Constitutional standards must be brought to bear on the issue of whether the plaintiff is sufficiently recognizable to give rise to liability. In *New York Times* v. *Sullivan*, 376 U.S. 254, at 288-292 (1964), the libel plaintiff had not been referred to by name, or official position; even the testimony of six witnesses that they had believed the allegedly defamatory statements to refer to the plaintiff, could not establish to a constitutionally sufficient certainty that the words were "of and concerning" the plaintiff so as to give rise to liability. See also *Riverhouse Pub. Co.* v. *Porter*, 287 F. Supp. 1 (D.R.I. 1968) (Pettine, J.).

[32] This Court has only recently ruled that liability without fault is an improper standard for defamation liability, because it "unnecessarily exacerbates the danger of media self-censorship." *Gertz* v. *Robert Welch, Inc.*, —— U.S. ——, 42 U.S.L.W. 5123, at 5131 (June 25, 1974). Quite plainly, the doctrine which has emerged from the New York courts in this litigation thus far, that any doctor who publishes a disguised case history without prior written consent does so at his or her peril, regardless of the sufficiency of the disguise, is a doctrine of liability without fault, and will inevitably encourage medical self-censorship.

them in support of plaintiff's allegation that she can be identified consisted of two affidavits: Plaintiff's own affidavit lists at length the passages in the book which she fears will identify her (A12-17), but names not a single person who in fact had identified her after the book had been published for over a month. The supporting affidavit of a single witness asserts, "I read only a few [of *1008*] pages of the Introduction and the portion of the book called "[. . .]"[33] but immediately realized that the book was exclusively about Mrs. [Doe] and her son [. . .][34] and her former husband. There was no doubt in my mind about the identity of the persons involved" (A66). Incredibly, despite its absolute language, this affidavit refers to not a single one of the passages specified in plaintiff's affidavit as identifying her, or to any other fact in the book or in plaintiff's life which could lead to identification.

Yet it was treated by the courts below as establishing plaintiff's case to such a certainty, that all of the First Amendment's strictures, and all of this Court's decisions, and all of the interests of the medical profession and the reading public, could be totally disregarded, and a book which may constitute a major contribution to the advancement of psychiatry could be enjoined from circulation for over a year. Clearly, if the decision below is permitted to stand, the impact upon medical writing will be direct, immediate, and severely deleterious. The injunction must be vacated.

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[33] The pseudonym used for plaintiff Doe in the book.

[34] The son's actual name; he of course also has a pseudonym in the book.

CONCLUSION

For all of the reasons set forth above, the decision of the court below must be reversed, and the injunction must be vacated.

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Respectfully submitted,

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